Supreme Court, U.S.
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No. 99-1184

In the Supreme Court of the ~~United States~~

LAURENCE MACK, WARDEN,
Petitioner,

v.

DAVID L. PARIS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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13RP

TABLE OF AUTHORITIES

Page

Cases

Boyd v. Cowan,
494 F.2d 338 (6th Cir. 1974) 5
Capps v. Sullivan,
13 F.3d 350 (10th Cir. 1993) 3
Carter v. Rafferty,
781 F.2d 993 (3rd Cir. 1986) 3
Coleman v. Thompson,
501 U.S. 722 (1991) 6, 8, 10
Edwards v. Carpenter,
No. 98-2060 (argued 2/28/00) 10
Foster v. Lockhart,
9 F.3d 722 (8th Cir. 1993) 2
Gardner v. Pitchess,
731 F.2d 637 (9th Cir. 1984) 3
Moore v. Zant,
972 F.2d 318 (11th Cir. 1992),
cert. denied, 507 U.S. 1007 (1993) 3
Murray v. Carrier,
477 U.S. 478 (1986) 6, 10
Pennsylvania v. Finley,
481 U.S. 551 (1987) 9, 10
Roe v. Flores-Ortega,
120 S. Ct. 1029 (2000) 5
State v. Fox,
83 Ohio St. 3d 514, 700 N.E.2d 1253 (1983) 8
State v. Getsy,
84 Ohio St. 3d 180, 702 N.E.2d 866 (1998) 9
State v. Gillard,
78 Ohio St. 3d 548, 679 N.E.2d 276 (1997) 9

State v. Lanham,
74 Ohio St. 3d 1453, 656 N.E.2d 948 (1995).....9
State v. Murnahan,
63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992).....8
State v. Robinson,
74 Ohio St. 3d 1518, 660 N.E.2d 472 (1996).....9
Strickland v. Washington,
466 U.S. 668 (1984).....5, 6
White v. Schotten,
201 F.2d 743 (6th Cir. 2000).....9

Other Authorities

James S. Liebman & Randy Hertz,
Federal Habeas Corpus Practice and Procedure, Vol. 2, §33.3 (3rd ed. 1998).....2
Ohio Appellate Rule 26(B)(1).....7, 8, 9
U.S. Const., Am. VI.....*passim*

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REPLY BRIEF FOR THE PETITIONER

The State of Ohio seeks review of a Sixth Circuit decision that allowed the misfeasance of a prisoner's state post-conviction counsel to excuse the prisoner's procedural default of a habeas claim. According to the court of appeals, the failure of prisoner David Paris's original appellate lawyer to "communicate to his client how to proceed with further appeals" once Paris's first-appeal-of-right was finished, and the additional three-year delay by Paris's post-conviction counsel in filing Paris's state post-conviction claim, together excused his failure to comply with Ohio's 90-day deadline for raising a post-conviction claim in the State's courts. Pet. App. at 5a-6a.

That decision runs counter to the deference federal habeas law has long shown to state procedural rules, and is not supported by this Court's decisions or the decisions of other federal courts. Yet respondent Paris claims in his brief in opposition that the question presented is moot, Br. in Opp. at 7-9, and he argues that the decision below is consistent with "well settled principles." *Id.* at 10, 18. He is wrong.

First, Paris suggests that the case is moot, because the court of appeals granted a conditional writ of habeas corpus on May 26, 1999, and the State has neither secured a stay of that judgment nor retried him. Yet as we explained in the petition for certiorari, Pet. at 12 n.2, respondent Paris was paroled in 1998, and so was not in custody when the conditional writ was issued the following year. Nothing in the opinion of the court of appeals (or in the district court's later order setting a retry-or-release-by date in conformity with that opinion) either bars the State from retrying Paris after he is released, or sets a date by which such a post-release retrial must begin. The two federal courts' orders – just like virtually every order granting conditional relief in a federal habeas case – simply barred the State from continuing to hold Paris in custody after a specified period of time. We have of course complied with the courts' orders, for respondent Paris has long since been released from custody.

But once a federal court orders a prisoner's conditional release, the State is entitled to "rearrest and reprosecute the prisoner" even after complying with the release order. *Foster v. Lockhart*, 9 F.3d 722, 727-28 (8th Cir. 1993). *See generally* James S. Liebman and Randy Hertz, *Federal Habeas Corpus Practice and Procedure*, Vol. 2, §33.3 at 1379 (3rd ed. 1998). The court of appeals' granting of the habeas writ in this case, like the district court's setting of a date for Paris's release or retrial, simply compelled Paris's release by some fixed date if his new trial had not begun by then. Because Ohio still is entitled to retry Paris on the original indictment today – though we think the court of appeals erred in ordering such a retrial, and so have sought certiorari here with the goal of avoiding that burden –

this case is certainly not moot. *See Carter v. Rafferty*, 781 F.2d 993, 998 (3rd Cir. 1986) (affirming grant of unconditional release without a stay, but explaining that the State was free to retry the prisoner and to deal with him "as the State would deal with any other State prisoner who has yet to stand trial" including rearresting and detaining him prior to trial); *Gardner v. Pitchess*, 731 F.2d 637, 640 (9th Cir. 1984) (district court's order in a habeas case dismissing the state-court criminal charges with prejudice was overbroad, as State remained free to retry the prisoner even after habeas writ had issued); *Capps v. Sullivan*, 13 F.3d 350, 352-54 (10th Cir. 1993) (except in rare habeas case where retrial is barred entirely, State is free to rearrest and reprosecute prisoner released pursuant to conditional release order); *Moore v. Zant*, 972 F.2d 318, 320 (11th Cir. 1992) (same), *cert. denied*, 507 U.S. 1007 (1993).

Second, Paris points to "the well-settled principle" that "[a]ttorney misfeasance on direct appeal can certainly serve as cause and prejudice to excuse a procedural default." Br. in Opp. at 10. But that principle – one that we ourselves cited in the petition, Pet. at 15, and certainly do not dispute – hardly resolves this case, where Paris's attorneys missed state-court deadlines *after* his first-appeal-of-right was *finished*. It was those post-appeal errors that Paris offered (and the Sixth Circuit accepted) as his cause for his state-court procedural default of his federal habeas claim – not "[a]ttorney misfeasance on direct appeal" as his brief now suggests.

We do not (at least in this Court) question Paris's claim that his lawyer in the direct appeal performed poorly, but the question presented here has nothing to do with the

strength or weakness of the "miniscule five-paragraph brief" that Paris's lawyer filed in his direct appeal. Br. in Opp. at 11. Had Paris complied with Ohio's deadline for attacking the effectiveness of that lawyer's work, Paris may very well have secured post-conviction relief in state court. But the issue here – as in the Sixth Circuit – is whether attorney errors committed *after* the completion of a prisoner's first-appeal-of-right (whether by the original appellate lawyer himself or by other counsel) can excuse the prisoner's failure to comply with state post-conviction deadlines. Certainly Ohio's highest court does not accept that excuse (and did not do so in Paris's case, Pet. App. at 44a-45a), and no federal court of which we are aware – other than the Sixth Circuit – has ever held that *those* errors (committed when the prisoner no longer has any Sixth Amendment right to counsel) should be treated just like attorney errors committed during the course of the first-appeal-of-right itself (when the prisoner no doubt *is* entitled to the effective assistance of counsel).

Paris insists that any attorney error that caused him to miss *by three years* the Ohio deadline for raising an ineffective-assistance-of-appellate-counsel claim was not the fault of "post-conviction counsel," (as we claim), but rather was the error of his "appointed appellate counsel," who failed to tell Paris about the result of his first-appeal-of-right. Br. in Opp. at 13. Yet that lack of communication from Paris's original appellate lawyer only explains the first few months of his long delay, for Paris acknowledges learning about the decision some four months after the state court of appeals acted. Any delay from that point forward surely was not the fault of the appellate lawyer, whose Sixth Amendment obligation to represent Paris adequately in the direct appeal had ended months before, when the case was submitted.

And while we agree with Paris that his appellate lawyer in the direct appeal *ought* to have told him about the state court of appeals' 1992 opinion affirming Paris's conviction, that lawyer had no *legal obligation* under the Sixth Amendment to do so.[1] Paris was entitled to have a constitutionally-effective lawyer present his first-appeal-of-right to the Ohio court of appeals in 1991 and 1992 after his trial, but once the court of appeals issued its decision in that appeal, the lawyer's act of telling or failing to tell Paris about the result of that appeal certainly could not have affected the outcome of that by-then-already-completed first-appeal-of-right. As the Court explained in *Strickland v. Washington*, 466 U.S. 668, 694 (1984), a criminal defendant's Sixth Amendment right to counsel is only prejudiced when "but for

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[1] Paris's suggestion that his original appellate counsel was required by the Sixth Amendment (rather than by the lawyer's ethical duties alone) to tell him about the state appellate court's decision in his first-appeal-of-right, or to tell him how to proceed with further discretionary appeals or post-conviction challenges thereafter, Br. in Opp. at 12, is not supported by the cases he cites or by any other decisions of which we are aware. The appellate decision that he cites, *Boyd v. Cowan*, 494 F.2d 338 (6th Cir. 1974), has nothing to do with a lawyer's duty to notify a client about the *results* of an appeal, for there the prisoner's lawyer failed to file a notice of appeal once the prisoner was convicted in the state trial court, just as was true in *Roe v. Flores-Ortega*, 120 S. Ct. 1029 (2000) (holding that counsel's failure to file a notice of appeal to initiate the first-appeal-of-right is not *per se* deficient). Those cases tell us nothing about any right to the effective assistance of counsel *after* a state court of appeals resolves a prisoner's first-appeal-of-right, and the Sixth Circuit's view that Paris had such a right appears to have no support in the Sixth Amendment or in any other decision interpreting that provision.

counsel's unprofessional errors, the result of the proceeding would have been different." Nothing that the lawyer did or did not do *after* the state court of appeals issued its decision in Paris's first-appeal-of-right could have influenced that decision, and it is only those after-the-fact errors – committed by both Paris's original appellate lawyer in 1992, and by the lawyers in the state public defender's office who represented him during post-conviction proceedings in Ohio's state courts – that Paris (like the Sixth Circuit) points to as the "cause" for his failure to comply with Ohio's deadline for raising a post-conviction claim of appellate attorney ineffectiveness.

The focus on *when* the attorney errors occurred matters, of course, because the errors of counsel can serve as cause for the procedural default of a habeas claim only if those errors themselves amounted to a Sixth Amendment violation that the federal habeas court can address. *See Coleman v. Thompson*, 501 U.S. 722, 754 (1991) ("In the absence of a constitutional violation, the petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation, as [*Murray v.*] *Carrier*, [477 U.S. 478, 490 (1986)] says explicitly."). And as we explained in the petition, this Court and lower federal courts have repeatedly held that a state prisoner has no Sixth Amendment right to counsel once the first-appeal-of-right is finished. Pet. at 16-19. Those are the "well settled principles" underlying this case, and it is only the judgment below that misapplied them. The court of appeals overlooked a state procedural bar that ought to have precluded federal habeas review of Paris's defaulted claim, and did so by labeling as the cause for that default the errors committed by Paris's lawyers *after* his right to counsel had ended.

In casting all blame for his state-court procedural default on the silence of his original appellate lawyer after the first-appeal-of-right ended in 1992 – a silence that, he claims, caused him to miss Ohio's 90-day period within which state prisoners must raise any challenges to the performance of their first-appeal-of-right lawyers – Paris surely overlooks the impact of his post-conviction lawyers' additional three-year delay once he learned that he had not succeeded in that first-appeal-of-right. When Ohio prisoners show "good cause" for missing the 90-day deadline, they may file a late ineffective-assistance-of-appellate-counsel claim. Ohio App. R. 26(B) (Pet. at 3). As the district court and magistrate judge who dismissed Paris's habeas petition explained, Pet. App. at 24a, 30a, had Paris (with or without the help of his busy post-conviction lawyers) promptly filed such a claim in 1992 once he learned that he had lost the direct-appeal-of-right in March of that year, Ohio's state courts very likely would not have treated the claim as defaulted, and therefore would have reached the merits of Paris's ineffective-assistance claim.

But instead, Paris and his overworked lawyers waited three more years before filing the ineffective-assistance claim, and it was *that* additional and unnecessary delay that the Ohio Supreme Court cited in finding that Paris had defaulted on the claim. Pet. App. at 44a-45a (declining to reach the merits of Paris's claim, and citing an earlier Ohio Supreme Court decision that held that post-conviction counsel's heavy workload was not "good cause" for failing to file a timely ineffective-assistance-of-appellate-counsel claim in Ohio). By overlooking that default when Ohio's courts did not, the Sixth Circuit ignored the independent and adequate state ground on which the state courts' decisions rested, and

the Sixth Circuit did so by erroneously relying on a claim of attorney error to excuse that default, even though those attorney errors occurred at a time when Paris had no Sixth Amendment right to counsel at all.[2]

Nothing that Paris says about Ohio's handling of ineffective-assistance-of-appellate-counsel claims undercuts our argument that the judgment below is inconsistent with *Coleman*. Pet. at 15-17. The Ohio Supreme Court decision that he touts – *State v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992) – predates the current version of Ohio App. R. 26(B). That rule, Pet. at 3, adopted in 1993, directs state prisoners to file all post-conviction challenges to the effectiveness of their appellate lawyers in the Ohio court of appeals, rather than the State's trial courts like all other post-conviction claims. But nothing in *Murnahan* or in any of the Ohio Supreme Court's other decisions or rules suggests that the Rule 26(B) process is anything other than what that court has repeatedly said it is: a "civil, post-conviction matter."

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[2] Paris's argument that "it d[id] not matter how long" his post-conviction lawyers waited before trying to raise the ineffective assistance claim after the 90-day deadline had passed, Br. in Opp. at 12, misstates Ohio law. *See State v. Fox*, 83 Ohio St. 3d 514, 516, 700 N.E.2d 1253, 1254 (1998) (where a prisoner should have filed his ineffective-assistance claim in 1992 after he lost his first-appeal-of-right then, he nonetheless had "good cause" for failing to do so from 1992-1995 because the same appellate lawyer continued to represent him during those years, but once the Ohio public defender took over the case, attorneys from *that* office could not show "good cause" for an *additional* three-year delay in filing the prisoner's ineffective-assistance claim); *id.* ("Good cause can excuse the lack of a filing only while it exists, not for an indefinite period.").

State v. Robinson, 74 Ohio St. 3d 1518, 660 N.E.2d 472 (1996); *State v. Lanham*, 74 Ohio St. 3d 1453, 656 N.E.2d 948 (1995). Ohio courts have never treated the Rule 26(B) process as "part of direct appeal" as Paris claims, Br. in Opp. at 15, and indeed, according to the language of the rule itself, a prisoner's challenge to the work of his appellate lawyer can only begin after "journalization of the appellate judgment." Pet. at 3.[3] And, consistent with the Sixth Amendment and with *Pennsylvania v. Finley*, 481 U.S. 551 (1987), Ohio provides counsel to prisoners in their direct appeals, but not in the Rule 26(B) process, where the misfeasance by Paris's current lawyers took place.[4]

As the 16 amici States supporting our petition have explained, the first question presented is a particularly important one for the States. The court of appeals' approach – one likely to play out in many other habeas cases whenever

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[3] As Paris notes, after we filed the petition for certiorari in this case, the Sixth Circuit issued a decision describing Ohio's App. R. 26(B) process as "a continuation of activities related to the direct appeal itself." *White v. Schotten*, 201 F.3d 743, 752 (6th Cir. 2000). Whether Ohio's courts would agree with that view or not, the court of appeals' view in this case – that the heavy workload of post-conviction counsel can serve as cause for a prisoner's procedural default – is certainly not limited to any one State's rules, and is not at all consistent with the decisions of other federal courts.

[4] The *Gillard* and *Getsy* cases that Paris cites are both capital cases, unlike this case. Br. in Opp. at 15-16. Ohio, like other States, provides counsel to prisoners on death row during state post-conviction proceedings, but that fact alone neither requires the States to provide counsel to *all* prisoners in post-conviction proceedings, nor converts those proceedings into part of the first-appeal-of-right process.

state prisoners point to the errors or heavy workload of post-conviction counsel as the cause for state-court procedural defaults – is not consistent with this Court's decisions in *Carrier*, *Coleman* or *Finley*. The judgment below marks a sharp break from this Court's habeas decisions of the last thirty years, and it undercuts the important interests in federalism and comity that ought to guide federal courts whenever they undertake review in habeas of a federal claim that a State's own courts did not reach. Whether the judgment below is vacated and the case remanded for further proceedings in light of the Court's pending decision in *Edwards v. Carpenter*, No. 98-2060, or reversed and remanded for further consideration consistent with the Court's previous decisions in *Carrier* and *Coleman*, the Court should not let the Sixth Circuit's error stand.

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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